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No. 05-9222

IN THE
Supreme Court of the United States

LONNIE L. BURTON,
Petitioner,

v.

DOUG WADDINGTON,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The consistent theme running throughout the State's brief – as well as its *amici*'s – is a persistent refusal to come to grips with this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The State suggests that *Blakely* was not dictated by *Apprendi* because *Apprendi* left the meaning of "statutory maximum" unclear. But the State simply ignores the passages in *Apprendi* that specifically and repeatedly elucidated the "statutory maximum" concept so as to foreordain the result in *Blakely*. Furthermore, the State insists that *Blakely* – even if it did produce a new rule – did not produce a watershed rule because the decision deals only with sentencing offenders "whose guilt already has been determined." Resp. Br. 34. But the State ignores that the fundamental point of *Blakely*, like *Apprendi* before it, is that courts may not sentence defendants for transgressions for which juries have *not* found them guilty. Once the real meanings of *Apprendi* and *Blakely* are taken into account, it is clear that the *Teague* doctrine does not bar Petitioner from seeking relief in this case. And none of the side issues that the State raises prevents this Court from so holding.

I. THE DISTRICT COURT PROPERLY EXERCISED JURISDICTION OVER THIS HABEAS PETITION.

Renewing an argument that the district court rejected, the Ninth Circuit rejected, and this Court did not even consider serious enough to prevent granting certiorari, the State contends that the district court lacked jurisdiction because this habeas petition is "second or successive." Resp. Br. 8-15. This argument has no factual or legal basis.

The State's "second or successive" argument derives from its assertion that Petitioner's two habeas corpus petitions challenged "the same state court judgment." Resp. Br. 9; *see also* Resp. Br. 3-4. But this is simply not true. The first habeas

petition Petitioner filed (in 1998) challenged the state court's original judgment – the "judgment of conviction [entered] Dec. 16, 1994." J.A. 34; *see also* Report and Recommendation, *Burton v. Walter*, No. C98-1844 (W.D. Wash.), Dkt. No. 38 at 1 (filed Feb. 14, 2000) (recognizing that Petitioner was challenging 1994 judgment). Petitioner explained to the district court that the Washington courts, in reviewing that judgment, had "affirmed [his] conviction" and "reversed [his] sentence." J.A. 35. Consequently, his 1998 filing challenged the 1994 judgment with respect to his convictions. J.A. 39-40. The current habeas petition – the one Petitioner filed in 2002 challenging his second resentencing – is indisputably his first and only challenge to the 1998 judgment.

It directly follows that this petition cannot be second or successive. AEDPA incorporates the longstanding understanding of the phrase "second or successive." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). And it has always been the case that petitions challenging new judgments are not second or successive when the claims could not have been brought any sooner. *See, e.g., In re Taylor*, 171 F.3d 185 (4th Cir. 1999) (collecting cases so holding). Even under the most literal understanding of "second or successive," *see Martinez-Villareal*, 523 U.S. at 648-49 (Thomas, J., dissenting), the first petition challenging any given judgment in a timely manner cannot be anything other than a first petition.

Petitioner, who was proceeding *pro se*, obviously filed his 1998 petition challenging the 1994 judgment because he was worried that if "he waited to file his claims challenging his conviction[s], he was at risk of losing the opportunity to present them [after his sentence became final] due to the one-year statute of limitations imposed under AEDPA." J.A. 66. The State reinforced Petitioner's assumption that AEDPA's clock was ticking when he filed that petition, stating that "Burton's judgment on his 1994 convictions became final

when the United States Supreme Court denied the petition for writ of certiorari on April 20, 1998." Respondent's Answer and Memorandum of Authorities, *Burton v. Walter*, No. C98-1844 (W.D. Wash.), Dkt. No. 14 at 18 (filed May 4, 1999) (reprinted at Addendum 21a of this brief). The State, however, now takes exactly the opposite position. It says that Petitioner's concern was unfounded because he could have challenged his convictions and ultimate sentence by means of the 1998 judgment and that that judgment – like any judgment in a criminal case – did not become final for purposes of habeas review until it "became final on the conclusion of direct review." Resp. Br. 14; *see also* 28 U.S.C. § 2244(d)(1)(A) (AEDPA's limitations period does not start running until "the date on which the judgment became final by the conclusion of direct review . . ."). *Amicus* CJLF echoes this argument, asserting that there was never a "[f]inal judgment" until the 1998 judgment became final because "in a criminal case . . . . the sentence is the judgment." CJLF Br. 8-9 (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

It is not entirely clear that the State and CJLF are correct.[1] But even if they are, the time for making this

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[1] It is true that for purposes of seeking direct appellate review, this Court has held that criminal cases do not result in "final judgments" until both convictions and sentences have been fully adjudicated. *Flanagan v. United States*, 465 U.S. 259, 263 (1984); *accord Berman*, 302 U.S. at 212. In the context of AEDPA, however, this Court has offered only the ambiguous statement that "[f]inality attaches when this Court affirms *a conviction* on the merits on direct review, or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003) (emphasis added). Furthermore, in assessing when state court adjudications create "final judgments" under 28 U.S.C. § 1257(a) for purposes of this Court's certiorari jurisdiction – a situation arguably more analogous to this one than direct review of a federal case because of the federal-state interplay involved – this Court has held that convictions that have been upheld are "final judgments" even when sentences are still on appeal. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). And to the extent underlying state law bears on this issue,

argument has long passed. AEDPA allows district courts to entertain a habeas petition from a state prisoner when it attacks "the judgment of a State court." 28 U.S.C. § 2254(a). If indeed there is no "judgment" for purposes of federal habeas review until a prisoner's conviction *and sentence* have become final, then the State could have moved during the federal litigation over Petitioner's 1994 judgment to dismiss the case for lack of jurisdiction. The Washington courts had vacated the 1994 judgment before it became final, so under the State's and CJLF's current view it was not susceptible to attack in federal court.

But this is as far as the State's and CJLF's argument goes. Even if the State could have prevented Petitioner from challenging the 1994 judgment on the ground that he should have had to wait until his 1998 judgment became final, this reality cannot transform the litigation over the 1994 judgment into a prior litigation over Petitioner's 1998 resentencing judgment. The district court in 1998 would not have had the authority to hear (or stay and abey) a challenge to the 1998 judgment because that judgment was not final either. As Petitioner himself told the district court, "THE sentence I received at resentencing [was still] on direct appeal" at that time. J.A. 40 (capitalization in original).

Even setting that predicament aside, this Court has held that a federal court cannot *sua sponte* recharacterize a *pro se*

Washington completes criminal cases with a document called a "judgment and sentence," thus indicating that convictions may constitute their own judgments. *See, e.g.*, J.A. 3, 7. Indeed, the Washington Court of Appeals recently ruled that the limitations period for challenging a "judgment and sentence" in *state* post-conviction review starts as soon as a conviction is affirmed on direct review, even if the sentence is vacated and remanded for resentencing. *In re Pers. Restraint Petition of Skylstad*, No. 24681-7-III (Dec. 15, 2005). The State is currently defending that decision in the Washington Supreme Court. *See* http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2006Sep.

litigant's filing as a first habeas petition "unless it informs the litigant of the consequences of the recharacterization, thereby giving the litigant the opportunity to contest the recharacterization, or to withdraw or amend the motion." *Pliler v. Ford*, 542 U.S. 225, 233 (2004) (describing holding of *Castro v. United States*, 540 U.S. 375, 377 (2003)). Although *Castro* concerned recharacterizing a different kind of filing (a motion under Fed. R. Crim. P. 33) into a habeas petition, the same logic applies here. Serious consequences attach to filing a first habeas petition challenging a particular judgment. Yet neither the district court nor the State ever once suggested to Petitioner that his challenge to the 1994 judgment could or would be treated as a challenge to his 1998 judgment. Had Petitioner been so warned (and assured that a later petition could challenge the convictions and the final sentence), he may well have withdrawn his petition. Accordingly, Petitioner's filing challenging his 1994 judgment could not have been transformed then -- and surely cannot be transformed now -- into one challenging the 1998 judgment.

II. THIS COURT'S DECISION IN *BLAKELY* DID NOT ANNOUNCE A NEW RULE.

The State asserts that *Blakely* announced a new rule because reasonable jurists could have concluded that *Apprendi* did not apply to facts authorizing sentences above the top of a statutory standard sentencing range but below what the State calls a "traditional statutory maximum." Resp. Br. 21-23. In addition, the United States argues that *Blakely* announced a new rule because it declined to craft an exception to *Apprendi* based on two differences between the Washington and New Jersey sentencing laws at issue in the cases. U.S. Br. 14-15. Neither of these arguments withstands scrutiny.

1. No reasonable jurist could have failed to appreciate that *Apprendi*'s "statutory maximum" rule dictated the result in *Blakely*. As the State implicitly acknowledges (Resp. Br. 19),

the "reasonableness" test is an "objective standard." *Stringer v. Black*, 503 U.S. 222, 237 (1992). Accordingly, even though state courts were divided following *Apprendi* over whether that decision applied to sentencing systems like Washington's,[2] "the mere existence of conflicting authority does not necessarily mean a rule is new." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring). The ultimate question remains whether a state court "would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

The State concedes, as it must, that *Apprendi* forbade courts from using facts not proven to a jury beyond a reasonable doubt to increase defendants' sentences beyond the prescribed "statutory maximum." Resp. Br. 15; *see Apprendi*, 530 U.S. at 490. But the State claims that the best reading of *Apprendi* is that it used the phrase "statutory maximum" to describe only a "traditional statutory maximum" – a concept never mentioned in the opinion but supposedly different in kind from a threshold set by a statutory "standard range." *See, e.g.*, Resp. Br. 21. Therefore, the State asserts, reasonable jurists could have believed that applying *Apprendi* to Washington's determinate sentencing system called for an extension of *Apprendi*, not just an application of its already-announced rule.

The State's argument ignores this Court's own words. This Court did more in *Apprendi* than simply say "statutory maximum" and leave for speculation what exactly that term meant. This Court clarified three separate times that a "statutory maximum" is the maximum statutory sentence a given defendant "would receive *if punished according to the facts*

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[2] The State, however, overstates the extent of the conflict. Three of the five decisions the State cites rejecting *Apprendi* challenges to state sentencing laws (*see* Resp. Br. 28 n.6) have nothing to do with the issue at hand. Florida, Louisiana, and Nebraska did not have determinate sentencing systems that were affected by *Blakely*.

reflected in the jury verdict alone." 530 U.S. at 483 (emphasis added); *see also id.* at 483 n.10 (the "statutory maximum" is the statutory "outer limit[]" based on "the facts alleged in the indictment and found by the jury"); *id.* at 482 n.9 ("Nothing in *Williams* [*v. New York*, 337 U.S. 241 (1949)] implies that a judge may impose a more severe sentence than *the maximum authorized by the facts found by the jury.*") (emphasis added).

To the extent that any reasonable jurist could have doubted whether this test covered the top of a statutory standard sentencing range in a guidelines-type system, a further passage in *Apprendi* would have erased it. There, this Court emphasized that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. It is telling, therefore, that not a single one of the pre-*Blakely* state court opinions holding that *Apprendi* did not apply to state determinate sentencing systems (*see* Resp. Br. 28 n.6; U.S. Br. 15 n.7) ever even mentioned this passage from *Apprendi*. Once that passage is taken into account, the result in *Blakely* follows inexorably.[3]

Nothing in Justice O'Connor's dissent in *Apprendi* – upon which the State and United States rely (Resp. Br. 22; U.S. Br. 12-13) – is to the contrary. That dissent suggested that

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[3] Because all that matters in this case is whether *Apprendi* dictated the result in *Blakely*, it is immaterial whether a reasonable federal jurist would have believed that *Apprendi* dictated the result in *United States v. Booker*, 543 U.S. 220 (2005). The federal cases the State and the United States cite upholding the Federal Sentencing Guidelines post-*Apprendi* are thus irrelevant. The same is true of the federal opinions post-*Blakely* that asserted that *Blakely* somehow altered the definition of "statutory maximum." *See* U.S. Br. 12. Those courts were considering whether *Apprendi* and *Blakely* applied to the non-statutory Federal Sentencing Guidelines. To whatever extent some of this Court's language in *Blakely* may have affected that inquiry, it remains that *Apprendi* dictated the *result* in *Blakely* because both cases involved dueling *statutory* sentencing limits. And federal courts recognized as much. *See* Petr. Br. 24 (citing cases).

"under one reading" of this Court's opinion, a sentencing system that "remove[d] from the jury (and subject[ed] to a standard of proof below 'beyond a reasonable doubt') the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced" would be constitutional. 530 U.S. at 540 (O'Connor, J., dissenting). Assuming that the "narrower ranges" in such a hypothetical system were statutorily dictated and constrained sentences' upward mobility, the system would be much like the one at issue in *Blakely*. Although Justice O'Connor herself acknowledged that "[i]t is difficult to understand . . . why the Constitution would" draw a line between such a system and the system in *Apprendi*, she asserted that the Court's discussion of the Arizona capital sentencing system suggested the possibility of such a "formalistic" distinction. *Id.* at 541.

But in truth the *Apprendi* Court's discussion of Arizona's capital sentencing system only reinforced that *Apprendi*'s rule was *not* of form, but rather of effect, and that systems like the one at issue in *Blakely* did not pass constitutional muster. While Justice O'Connor asserted that Arizona's system required a finding of fact beyond the jury verdict in order to impose the death penalty, the majority expressly stated that it did not understand the system to work that way. *See* 530 U.S. at 496-97. The majority said that its decision would allow Arizona's system to stand because the system – perfectly consistent with *Apprendi*'s reaffirmance of *Williams*, *see* 530 U.S. at 481-83 & 482 n.9 – required "the jury [to find] the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death." *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)).

The *Apprendi* Court never suggested that any system that worked the way Justice O'Connor described the Arizona system would satisfy its ruling. In fact, once it became clear

the following year that Arizona's system did actually require courts to find an aggravating fact beyond the jury's verdict to impose the death penalty, this Court promptly invalidated the system on the straightforward ground that it exposed defendants to greater punishment than allowed "if punished according to the facts reflected in the jury verdict alone." *See Ring v. Arizona*, 536 U.S. 584 (2002) (quoting *Apprendi*, 530 U.S. at 483). Not a single Justice disputed that *Apprendi* dictated that result.

2. The United States' alternative argument that *Blakely* announced a new rule because it declined to create an exception to *Apprendi* fares no better. The United States contends that a reasonable jurist could have declined to apply *Apprendi* in *Blakely* because (1) the factual finding in *Apprendi* was alone sufficient to impose an enhanced sentence, whereas finding an aggravating fact under Washington's sentencing system authorized a court to impose a heightened sentence if it found "substantial and compelling reasons" to do so; (2) *Apprendi* involved a single aggravating fact that had been specified by the legislature, whereas the list of aggravating facts in the Washington system was illustrative. U.S. Br. 14.

It is true that a hoilding refusing to craft an exception to a prior decision can create a new rule. In *Butler v. McKellar*, 494 U.S. 407, 415 (1990), this Court held that a decision announces a new rule when "[i]t would not have been an illogical or even a grudging application" of an earlier decision to decide that it "did not extend to the facts" of the subsequent case. But when the "differences [in the state systems at issue] could *not* have been considered a basis for denying relief" in light of an earlier decision, then declining to create an exception does not constitute a new rule. *Stringer*, 503 U.S. at 229 (emphasis added). Neither of the differences between New Jersey's hate-crime enhancement system and Washington's exceptional sentence system could reasonably have been considered a basis for declining to find the sentence in *Blakely* unconstitutional.

First, this Court explained in *Apprendi* that the "legally significant" characteristic of the New Jersey law at issue was that it "increased – indeed, it doubled – the maximum range *within which the judge could exercise his discretion*." 530 U.S. at 474 (emphasis added). This Court did not suggest that it might possibly matter whether a standard governed that use of discretion. That is why this Court dismissed in a footnote any possible distinction between the New Jersey and Washington systems, noting that regardless of what type of discretion (if any) a judge has regarding whether to impose an enhanced sentence, the decisive question is whether he can invoke such discretion "without finding some facts to support it beyond the bare elements of the offense." *Blakely*, 542 U.S. 296, 305 n.8.

Second, the illustrative nature of the list of aggravators in Washington's exceptional sentencing system did not provide any reasonable means to distinguish *Apprendi*. As an initial matter, the aggravator in *Blakely* (just like here) was specifically statutorily enumerated, *see* 542 U.S. at 300; J.A. 30-31, so the case was on all fours with *Apprendi*. But even putting that aside, *Apprendi* held that the rights to jury trial and proof beyond a reasonable doubt attached to "*any* fact" that authorized a sentence above the maximum a defendant would receive if punished according to the facts reflected in the jury verdict alone. 530 U.S. at 490 (emphasis added). It consequently was clear from the outset, as *Blakely* later put it, that the illustrative nature of a sentencing system's aggravating factors was "immaterial" to the analysis that *Apprendi* requires. 542 U.S. at 305. Regardless of "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . or *any* aggravating fact . . . , it remains the case that the jury's verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305. Indeed, if anything, the ability of Washington judges to enhance sentences based on unenumerated factors made *Blakely*'s system *worse* than the one in *Apprendi*. The Due Process Clause requires criminal codes to give "fair warning" of conduct that subjects people to

punishment. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). Enhancing sentences based on unenumerated aggravators flatly contravenes that "basic principle," *id.*, in addition to implicating the jury-trial and beyond-a-reasonable-doubt guarantees.

The only way, in short, for a court that read and absorbed all of *Apprendi* to have refrained from invalidating Washington's system for imposing exceptional sentences would have been to conclude – to borrow Justice Breyer's phrase – that this Court did not really "mean[] what it said" in *Apprendi*. *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting). Perhaps that is what some state courts really thought. But this does not make their refusals to apply *Apprendi* to Washington's system and others like it objectively reasonable. This Court has made clear, as a general matter of judicial decisionmaking, that even when "a precedent of this Court [that] has direct application in a case . . . appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). It follows *a fortiori* that when, as here, this Court has laid down a rule that directly applies to a case, and there are not even any significant crosscurrents in this Court's case law, state courts must follow the letter of this Court's precedent.

Accordingly, this Court should reject the State's invitation to allow state courts to decide with impunity when this Court really means what its opinions say. Such a notion is a recipe for lawlessness. And part of the historical purpose of federal habeas review is to "serve[] as a necessary additional incentive" against state courts' taking such action. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

III. IF *BLAKELY* DID ANNOUNCE A NEW RULE, IT ANNOUNCED A WATERSHED RULE OF CRIMINAL PROCEDURE.

Even if *Blakely* somehow established a new rule, *Blakely* is a "watershed rule[] of criminal procedure." *Teague*, 489 U.S. at 311. Although the State asserts that the *Blakely* rule neither (A) seriously diminishes the likelihood of obtaining an accurate conviction nor (B) alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding, its arguments do not hold weight.[4]

A. A Violation of the *Blakely* Rule Seriously Diminishes the Likelihood of Obtaining an Accurate Conviction.

This Court held in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), and *Hankerson v. North Carolina*, 432 U.S. 233 (1977), that failing to use the reasonable doubt standard with respect to even a single element "substantially impairs [the trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V.*, 407 U.S. at 204 (per curiam) (all elements); *accord Hankerson*, 432 U.S. at 242 (one element). The State nevertheless contends that these cases do not control the accuracy-diminishing inquiry here because (1) they were cases on direct review decided prior to *Teague* establishing the test for identifying watershed rules and (2) the issue here "is not the guilt or innocence of the defendant, but the appropriate

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[4] The State also asserts that AEDPA does not allow federal courts to apply new watershed rules retroactively. Resp. Br. 40-43. But this argument lies outside the questions presented, which are limited to whether *Teague* bars relief here. *See* Petr. Br. i. In any event, the Brief for Hon. Edward N. Cahn et al. as *Amici Curiae* Supporting Respondent in Whorton v. Bockting, No. 05-595, in which the question is actually presented, explains why the State is incorrect.

punishment for the defendant whose guilt has already been determined." Resp. Br. 34-35. Neither argument has merit.

1. Despite the fact that *Ivan V.* and *Hankerson* arose in different circumstances from this case, the accuracy-diminishing standard the Court applied in those cases is the same as the one it later established in *Teague*. Under *Teague*, just like under this Court's earlier retroactivity test utilized in *Ivan V.* and *Hankerson*, the test is whether infringement of the rule "seriously diminish[es] the likelihood of obtaining an accurate conviction." *Tyler v. Cain*, 533 U.S. 656, 665 (2001). And contrary to the United States' suggestion (Br. 29-30), nothing in this Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), suggests the contrary. *Schriro* simply quoted *Teague* itself and its explanation that violating the accuracy-diminishing inquiry creates an "'impermissibly large risk' of punishing conduct the law does not reach." *Schriro*, 542 U.S. at 356 (quoting *Teague*, 489 U.S. at 312-13). That explanation is simply another way of saying that a criminal trial's "truth-finding function" has been unduly impaired. *Ivan V.*, 407 U.S. at 204.

2. The State's insistence that the factfinding here does not pertain to guilt/innocence evinces nothing more than a continuing refusal to come to grips with the holdings of *Blakely* and *Apprendi*. The core holding of those decisions is that any fact – even if labeled an enhancement or aggravating fact – that subjects a defendant to heightened punishment is an element of the offense for which the defendant has been convicted. *See, e.g.*, *Blakely*, 542 U.S. at 306; *Apprendi*, 530 U.S. at 495. When, therefore, a court finds such a fact by a preponderance during a sentencing proceeding, it effectively finds the defendant guilty of a new and greater crime without affording the defendant the customary procedural protections that apply to elements of crimes. *See* Petr. Br. 30-31. Accordingly, the accuracy-diminishing analysis in *Ivan V.* and *Hankerson* applies with full force in the context of a *Blakely* violation.

The fact that *Blakely* involves the standard of proof that courts must apply before finding a defendant guilty of a given offense distinguishes it from all of the other circumstances the United States cites (*see* U.S. Br. 25-27) in which this Court has condoned using the preponderance standard to find certain facts. In all of those circumstances, the findings at issue involve collateral matters or are used to calibrate punishment within a range already authorized by findings a jury has made beyond a reasonable doubt. *Blakely*, however, involves the facts that establish that range in the first place. It therefore resides at the core of the criminal justice system's truth-seeking function.

B. *Blakely* Implicates Our Understanding of the Bedrock Procedural Elements Essential to the Fairness of a Proceeding.

The State and the United States contend that *Blakely* does not have the sweep or primacy necessary to constitute a bedrock rule because (1) *Blakely* applies only in a select group of states with determinate sentencing systems; (2) *Blakely* made only an "incremental" change in the law that does not rise to the level of establishing a prerequisite for fundamental fairness. Neither of these arguments withstands scrutiny.

1. It makes no sense to assert, as the United States does (Br. 20), that *Blakely* does not apply in enough jurisdictions to constitute a bedrock rule. *Blakely,* like any federal constitutional decision, establishes a baseline principle that applies in *every* jurisdiction: any fact, except a prior conviction, that exposes a defendant to punishment above an otherwise binding statutory maximum must be proved to a jury beyond a reasonable doubt.

Even if the number of states forced to change their laws in immediate reaction to a ruling were relevant, *Blakely* would easily qualify as a bedrock rule. Prior to this Court's decision

in *Gideon v. Wainwright*, 372 U.S. 335 (1963), only five states failed to provide counsel for indigent defendants in non-capital criminal cases. William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1156 (1963). Yet all agree that *Gideon* established a bedrock rule. Though some sorting is still taking place, *Blakely* already has required nine states to reconfigure their determinate sentencing schemes.[5]

2. It likewise is immaterial whether *Blakely* (assuming it announced a new rule) effectuated an "incremental" change in the law, or something more. Nothing in *Teague*'s test for being a bedrock rule requires a decision to mark a dramatic change from prior law. All that is required is that a decision "implicat[e]" the fundamental fairness of proceedings. *Schriro*, 542 U.S. at 355 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)). That is why *Gideon* established a bedrock rule, even though before the decision defendants charged with felonies in federal court already enjoyed a right to counsel, as did all defendants charged with capital offenses. *See Johnson v. Zerbst*, 304 U.S. 458 (1938) (all federal cases); *Powell v. Alabama*, 287 U.S. 45 (1932) (capital cases). In the recent words of the Eleventh Circuit: "[I]t is the sheer importance of the right [involved] that is primary to the analysis, not the incremental extension of that right in the case at hand." *Howard v. United States*, 374 F.3d 1068, 1080-81 (11th Cir. 2004).

Even if the degree of refinement a decision effectuates were relevant to the bedrock calculus, a comparison to right-to-counsel cases again would show why *Blakely* is a bedrock rule. This Court held prior to *Teague*, and lower courts have

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[5] *See* Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* Supporting Petitioner at 7-8, *Cunningham v. California*, No. 05-6551 (U.S. May 8, 2006); Nancy J. King & Susan R. Klein, *Beyond* Blakely, 51-DEC Fed. Law. 53, 53 (2004) (noting that *Blakely* "threatens" the sentencing system in 14 states).

consistently held since, that each time the scope of *Gideon* has been clarified, those decisions have applied retroactively. *See Howard,* 374 F.3d at 1077-81 (collecting cases and holding that clarification of right to counsel in *Alabama v. Shelton*, 535 U.S. 654 (2002), is a bedrock rule). These decisions make perfect sense: if, for example, states had been free following *Gideon* to define for themselves what crimes constituted "felonies" and to restrict the right to counsel to the trial phase of such prosecutions, the right to counsel would not have been worth very much. Accordingly, decisions clarifying the scope of the right to counsel have been just as important as recognizing the right itself.

So too with the rights to trial by jury and proof beyond a reasonable doubt. It is true that decisions such as *Duncan v. Louisiana,* 391 U.S. 145 (1968), and *In re Winship*, 397 U.S. 358 (1970), first recognized that these rights applied in state criminal trials. But without *Apprendi*'s and *Blakely*'s prohibitions against "circumvent[ing] [those protections] merely by 'redefin[ing] the elements that constitute different crimes,'" *Apprendi*, 530 U.S. at 485 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)), those rights would not have much genuine force. A state, for example, could set up a system under which a judge "could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene." *Blakely*, 542 U.S. at 306. Indeed, "when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction" between convictions for a greater and a lesser crime "may be of greater importance than the difference between guilt or innocence for many [minor] crimes." *Mullaney*, 421 U.S. at 698.

Contrary to the State's assertion (Resp. Br. 32), there is no tension between this conclusion and this Court's recent holding that at least some *Blakely* errors can be deemed

harmless. *See Washington v. Recuenco*, 126 S. Ct. 2546, 2551-53 (2006). As was relevant in *Recuenco*, constitutional errors require automatic reversal only when they "*necessarily* render[] a criminal trial fundamentally unfair." *Id.* at 2551 (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)) (emphasis added). There are surely some instances – such as when the defendant had fair notice of an alleged basis for an enhancement and failed to dispute the prosecution's overwhelming evidence – when a reviewing court can confidently say that failing to put the factual issue to the jury did not result in a fundamentally unfair trial.[6] But that reality does not undermine the conclusion that submitting to juries for proof beyond a reasonable doubt factual issues that expose defendants to heightened punishment is a bedrock requirement for criminal trials in general.

Any other analysis would lead to simply unacceptable results. This Court, for instance, has held that the rule prohibiting the government from knowingly using false evidence to obtain a conviction is subject to harmless error. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). Yet it could hardly be gainsaid that this rule is "[o]ne of the bedrock principles of our democracy, 'implicit in any concept of ordered liberty,'" and that "[d]eliberate deception of a judge and jury is 'inconsistent with the rudimentary demands of

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[6] In *Recuenco*, the error at issue was not a "full" *Blakely* error because the State alleged the sentence enhancement in the charging instrument and the issue was actually litigated at trial. *See* 126 S. Ct. at 2549. Consequently, this Court did not directly address whether a *Blakely* violation, like the one here, in which the defendant had no notice "from the face of the felony indictment" that he faced the possibility of enhanced punishment, *Apprendi*, 530 U.S. at 478, could be deemed harmless. *See Recuenco*, 126 S. Ct. at 2552 n.3; *id.* at 2554 (Stevens, J., dissenting); Transcript of Oral Argument at 54-56, *Washington v. Recuenco*, No. 05-83 (U.S. Apr. 17, 2006) (State explicitly distinguishing between these two types of errors and recognizing that failing to put defendant on notice that he was facing an aggravated crime "could have any number of implications" not present in *Recuenco*).

justice.'" *Hayes v. Woodford*, 301 F.3d 1054, 1088-89 (9th Cir. 2002) (Thomas, J., concurring in part and dissenting in part) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Similarly, the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), prohibiting the government from suppressing evidence favorable to the accused, requires reversal only when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quotation omitted). Yet it would be difficult to argue that *Brady* is not a bedrock rule essential to the fairness of criminal trials.

The point is that the tests for structural errors and bedrock rules serve different goals. Even if violating a rule results in an error that can be segregated from the rest of the trial and is sufficiently quantifiable that it is susceptible to harmless error review (on direct review or on habeas), that does not necessarily mean that the rule itself is not a bedrock rule essential to the fairness of criminal trials. *Blakely* is a bedrock rule.

IV. IF THIS COURT HOLDS THAT *BLAKELY* APPLIES RETROACTIVELY, IT SHOULD REMAND THE CASE FOR FURTHER PROCEEDINGS.

The State finally argues that even if this Court holds that *Blakely* applies retroactively under *Teague*, it should still affirm the Ninth Circuit's judgment because the state trial court's imposition of consecutive sentences did not actually violate *Blakely*. Resp. Br. 43-49. The Ninth Circuit, however, never considered this argument, and it lies beyond the questions presented. Accordingly, it suffices to say that there is no reason for this Court to depart from its customary course of remanding cases for courts of appeals to consider unresolved

issues in the first instance. *See, e.g.*, *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (per curiam).

This course is especially advisable here because the State has neglected to provide critical information respecting its argument. The State maintains that the imposition of Petitioner's consecutive sentences was constitutional because courts have "overwhelmingly" and correctly "concluded that *Apprendi* and *Blakely* do not apply to the imposition of consecutive sentences, at least where the sentences for each individual count does [sic] not exceed the statutory maximum." Resp. Br. 45 & n. 10. But most of the cases the State cites are pre-*Booker* federal cases applying the Federal Sentencing Guidelines, and thus have no relevance here. And none of the state cases the State cites involved systems in which a trial court needed to find an aggravating fact beyond the jury's verdict to impose sentences consecutively instead of concurrently. In Washington, by contrast, imposing consecutive sentences for the crimes at issue here constitutes an "exceptional sentence," and thus the trial court here could do so only upon finding an "aggravating fact" under exactly the same procedures as were at issue in *Blakely* itself. *See* Petr. Br. 3-4.[7] In the only other state with a comparable system under which "judicial fact-finding must occur before consecutive sentences may be imposed," the state supreme court had little difficulty concluding that the system "violate[d] principles announced in *Blakely*." *State v. Foster*, 845 N.E.2d 470, 491 (Ohio 2006).

To the extent the State asserts that Petitioner's exceptional sentence does not violate *Blakely* because the

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[7] The Washington case the State cites, *State v. Cubias*, 120 P.3d 929 (Wash. 2005), involved consecutive sentences that were imposed under a different part of the state sentencing system. Unlike the "exceptional sentence" procedures at issue here and in *Blakely*, the procedures at issue in *Cubias* did not require the trial court to find an "aggravating fact" before imposing consecutive sentences.

particular aggravator that supports the sentence – namely, that in light of Petitioner's multiple offenses, it would be "clearly too lenient" to give concurrent sentences – is a "legal judgment" that is exempt from *Blakely*, *see* Resp. Br. 48, the State simply misrepresents state law. As the State must be aware, the Washington Supreme Court expressly has held that the Sentencing Reform Act's "clearly too lenient" aggravator requires a "factual determination," not simply a legal judgment, "that *cannot* be made by a trial court following *Blakely*." *State v. Hughes*, 110 P.3d 192, 203 (Wash. 2005). Specifically, the "clearly too lenient" aggravator requires a finding that there was "some extraordinarily serious harm or culpability resulting from [the] multiple offenses." *Id.* at 202 (quotation omitted). That construction of state law is binding on this Court. *See, e.g.*, *Mullaney*, 421 U.S. at 690-91. And these are exactly the kind of factual determinations that fall within the rule of *Apprendi* and *Blakely* and far outside the "prior conviction" exception in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See, e.g., Apprendi*, 530 U.S. at 492-93 (defendant's *mens rea*); *Jones v. United States*, 526 U.S. 227, 236 (1999) (harm-related aggravator).

CONCLUSION

For the forgoing reasons, as well as those stated in Petitioner's opening brief, this Court should reverse the decision of the Court of Appeals and remand the case for further proceedings.

Respectfully submitted,

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October 2006

THE HONORABLE DAVID E. WILSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

LONNIE L. BURTON, Petitioner, v. KAY WALTER, Respondent.	No. C98-1844L (Consolidated with C98-1846L) RESPONDENT'S ANSWER AND MEMORANDUM OF AUTHORITIES (Filed May 4, 1999)

The Respondent, by and through her attorneys, CHRISTINE O. GREGOIRE, Attorney General, and JOHN J. SAMSON, Assistant Attorney General, answers Burton's consolidated habeas corpus petitions.

I. BASIS OF CUSTODY

Burton is in custody at the Airway Heights Correction Center pursuant to his 1992 convictions for rape of a child in the second degree, child molestation in the second degree and sexual molestation of a child. Exhibit 1, Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 2, Order Amending Judgment and Sentence to Reflect Correct Offender Scores, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 3, Statement of Defendant on Plea of Guilty, *State v. Burton,* King County Cause No. 92-1-02798-1. Burton is also in custody for his 1994 convictions for first degree rape, first degree robbery and first degree burglary. Exhibit 4, Judgment and Sentence, *State v. Burton,* King County Cause No. 93-1-06948-7.

II. STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS.

1. Facts Related To King County Cause No. 92-1-02798-1.

The Washington Court of Appeals summarized the facts of Burton's 1992 convictions as follows:

> In October 1992, Lonnie Burton pleaded guilty to second degree rape of a child (count I), second degree child molestation (count II), and sexual exploitation of a minor (count IV). Under the terms of the plea agreement, the State dropped 5 additional charges and recommended standard-range sentences for all 3 counts, including 90 months for count II.
>
> On November 20, 1992, the court imposed the following concurrent standard-range sentences: 89 months (count I), 102 months (count II), and 102 months (count IV). The sentences on counts I and IV were at the top end of the standard range; the sentence on count II was at the mid-point. Burton's offender scores were based in part on a prior conviction in Snohomish County for third degree child rape.
>
> Burton's sentence was affirmed on appeal. *State v. Burton,* No. 31847-1-I (June 20, 1994). He then moved to withdraw his guilty plea, arguing that it was not voluntary. On May 8, 1995, the trial court denied that motion.
>
> On April 25, 1995, Burton's Snohomish County conviction for third degree child rape was reversed and remanded for a new trial. *State v. Burton,* No. 31432-7-I. On September 7, 1995, Burton moved for resentencing, arguing that the judgment and sentence should be amended to reflect the lower offender scores resulting from the reversal of his Snohomish County conviction. Based on the recalculated offender

scores, the standard ranges for Counts I and IV were reduced. The standard range for Count II remained the same (87-116 months) because the offender score was reduced from 12 to 9. Counsel for Burton asked the court to impose lower sentences on counts I and IV, but the same sentence on count II (102 months).

In a written resentencing recommendation filed on January 2, 1996, the State noted that it was bound by the plea agreement and recommended lower sentences on counts I and IV to reflect the recalculated standard ranges. The State's recommendation for count II remained the same (90 months).

The State also alerted the court to what it termed a "potential fraud." Defense counsel had submitted a supplemental sentencing memorandum asserting that Burton's 2 Indiana theft convictions had been reduced to misdemeanors, a fact that would have lowered the offender scores even more. Defense counsel's memorandum was apparently based on Burton's declaration and 2 attached exhibits purporting to show that Burton's motion to reduce the Indiana convictions to misdemeanors had been granted. The deputy prosecutor submitted evidence that Burton's motion had in fact been denied and that the exhibits purporting to show otherwise had been altered. Two days later, defense counsel withdrew as Burton's attorney, informing the court that he now believed Burton's Indiana convictions had not been reduced.

Resentencing occurred on May 8, 1996. Burton, who was represented by new counsel, participated in the hearing by telephone. At the beginning of the hearing, the deputy prosecutor summarized the case at the court's request, stating that "we've prepared a modified Judgment and Sentence to reflect the newer, lower standard ranges, and it's my understanding that the total term of confinement of 102 months

remains in effect." The trial court responded that the prosecutor's understanding was correct as to count II, "as the midpoint of what remains the standard range of 87 to 116." The court then stated that "it does remain the court's intention to reimpose the same sentence as previously on that count."

At this point, Burton asked the deputy prosecutor what his recommendation was, and the deputy prosecutor replied, "[m]y recommendation is 102." Burton then moved to withdraw his guilty plea, arguing that the State had violated the terms of the plea agreement by changing its recommendation from 90 months to 102 months. The trial court denied the motion, noting that it was simply retaining the previously imposed sentence and that the court's decision bore no relation to the State's "recommendation." The court also indicated, in an apparent reference to the incident involving Burton's Indiana convictions, that the circumstances occurring after the guilty plea might serve to release the State from its obligations under the plea agreement.

The deputy prosecutor explained that the proposed order had been worked out with Burton's prior attorney and that his comment in response to Burton's question merely reflected his awareness that the court intended to impose a sentence of 102 months on count II.

Exhibit 5, Unpublished Opinion, *State v. Burton,* Court of Appeals Cause No. 38810-0-I, at 2-4.

2. Facts Related To King County Cause No. 93-1-06948-7.

The Washington Court of Appeals summarized the facts of Burton's 1994 convictions as follows:

On October 18, 1991, 15-year-old M.C. was raped at gunpoint by a stranger he later identified as Lonnie Burton. According to M.C.'s testimony, the episode began when, shortly after he arrived home from school, there was a knock at his door. Answering the door, he found Burton offering hockey tickets for sale. M.C. declined to purchase any. Burton asked whether he could use the telephone. When M.C. refused, Burton presented a gun and forced his way into the home. Burton told M.C. to go upstairs, asked M.C. not to look at him, and followed M.C. upstairs. He ordered M.C. to go into his bedroom. Burton then orally and anally raped M.C. After ejaculating, Burton showed M.C. the clock and told him he would shoot him if he moved within 15 minutes. Burton then left M.C.'s bedroom and removed $160 from M.C.'s parents' dresser.

When M.C.'s father came home, M.C. was not yet certain whether his assailant had left the house. M.C. told his father that he was raped. After his father checked through the house for the intruder, they called the police.

The police came and gathered evidence. They gathered hair samples and fingerprints, and took M.C.'s bedspread and clothing. The police canvassed the neighborhood in search of witnesses. M.C. was taken to the hospital, where a rectal swab was taken. Due to a lack of leads, the case was inactivated less than a month later.

Meanwhile Burton went to Indiana and, for reasons unrelated to this case, was detained in an Indiana jail. There he befriended another inmate, James Martin, and shared with Martin information about a rape Burton was charged with in Snohomish County, involving a victim named J.L. [footnote omitted] Also, Burton shared information regarding the M.C. rape.

After Burton shared this information he and Martin had a falling out. Fewer than five months after the M.C. rape, Martin wrote a letter to Mark Roe, a deputy prosecutor in Snohomish County responsible for the Snohomish County case against Burton. Martin wrote that Burton had told him about the Snohomish County case and furnished details. Martin also furnished details about a rape Prosecutor Roe was later able to identify as the M.C. rape.

The physical evidence was inconclusive. Fingerprints lifted from the screen door and from a card in the dresser drawer matched neither Burton nor any member of M.C.'s family. Pubic hairs found were similar only to M.C., and head hairs found were significantly different than Burton's. M.C.'s identification of Burton was not entirely positive; he chose Burton from a line-up of six as the one who most looked like his assailant, but he chose a different person in the line-up as the one who most sounded like the assailant.

A neighbor, Colleen Barnes, testified that she saw someone running from the direction of the M.C. house the day of the rape. She said he entered a car parked across the street from her home and then sped away. She further testified that the car she saw that day strongly resembled one Burton had borrowed from a friend during the week of the incident. Barnes also chose Burton out of a photo montage as the person who most closely resembled the person she saw that day.

Also testifying was Manuel Parejo, who was in the Snohomish County jail with Burton in September 1992. According to Parejo, Burton acknowledged telling Martin too much information about a crime. Parejo too, like Martin, was able to recite details of the M.C. rape.

> Burton testified. He denied that he raped M.C., and explained that he was with Cory Howerton and Mike Pepion after school on the day of the rape. He testified that he picked up Howerton from school, they went to Howerton's home, then to Pepion's home, and then to football games in West Seattle and Edmonds. Howerton and Pepion each testified to being at a soccer game with Burton on the day of the rape.

Exhibit 6, Unpublished Opinion, *State v. Burton,* Court of Appeals Cause No. 35747-6-I, at 1-4.

B. STATEMENT OF PROCEDURAL HISTORY.

1. Procedural History Related To King County Cause No. 92-1-02798-1 (Challenged Under Cause No. C98-1844L).

Following Burton's guilty plea, the State recommended a sentence of 90 months in accordance with the plea agreement. Exhibit 7, Plea Agreement, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 8, State's Sentence Recommendation, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 9, Verbatim Report of Proceedings (November 20, 1992 and May 8, 1996), *State v. Burton,* King County Cause No. 92-1-02798-1, at 4-5. The court sentenced Burton to concurrent standard range sentences of 89 months for count I, 102 months for count II, and 102 months for count IV, for a total sentence of 102 months. Exhibit 1, at 2-3.[1]

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[1] The superior court denied Burton's motion to withdraw his guilty plea. Exhibit 14, Motion to Withdraw Guilty Plea, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 15, Brief in Support of Motion to Withdraw Guilty Plea, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 16, Defendant's Motion to Withdraw Guilty Plea and

(Continued on following page)

The Washington Court of Appeals affirmed the sentence, and the Washington Supreme Court denied review. Exhibit 10, Unpublished Opinion, *State v. Burton,* Court of Appeals Cause No. 31847-1-I; Exhibit 11, Petition for Review, *State v. Burton,* Supreme Court Cause No. 62026-1; Exhibit 12, Ruling Denying Motion for Discretionary Review, *State v. Burton,* Supreme Court Cause No. 62026-1. The mandate issued on December 7, 1994. Exhibit 13, Mandate, *State v. Burton,* Court of Appeals Cause No. 31847-1-I.

In September 1995, Burton moved to amend his judgment and sentence following the reversal of a prior conviction used in calculating the offender score. Exhibit 19, Motion to Resentence Defendant and Amend Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 20, Declaration of David Trieweiler, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 21, Declaration of Lonnie Burton in Support of Trial and Motion for Resentencing, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 22, Supplemental Memorandum in Support of Motion to Resentence Defendant and Amend Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1. The State submitted a written recommendation in response to Burton's motion:

> The State is bound by its plea agreement with the defendant and therefore recommends

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Memorandum in Support Thereof, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 17, Declaration of Lonnie Burton, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 18, Findings of Fact and Conclusions of Law on Defendant's Motion to Withdraw His Guilty Plea, *State v. Burton,* King County Cause No. 92-1-02798-1.

> that the court sentence the defendant to the following concurrent terms on resentencing:
>
> On count I, 61 months
> On count II, 90 months
> On count IV, 75 months
>
> The total recommended time would be 90 months. All other conditions of the previous Judgment and Sentence should be reimposed.

Exhibit 23, State's Recommendation on Resentencing, *State v. Burton,* 92-1-02798-1, at 2.[2]

The superior court conducted a hearing on May 8, 1996. Exhibit 9, at 25-35. The prosecutor presented an order modifying the judgment and sentence to reflect the correct offender scores. Exhibit 9, at 26; Exhibit 2. When Burton asked the prosecutor for his recommendation, the prosecutor responded, "My recommendation is 102." Exhibit 9, at 27. The prosecutor later clarified he was not changing the State's original sentencing recommendation. Exhibit 9, at 34.

Judge Downing indicated he would amend the sentences on counts I and IV to reflect the new standard ranges, but it was his intent to reimpose the same sentence on count II because the standard range had not

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[2] The State also informed the court that documents concerning Burton's Indiana conviction had been altered. Exhibit 23, at 2-3. Burton's attorney then filed a supplemental declaration and moved to withdraw as counsel. Exhibit 24, Supplemental Declaration of David A. Trieweiler Re Defendant's Motion to Amend Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 25, Notice of Withdrawal and Substitution of Counsel, *State v. Burton*, King County Cause No. 92-1-02798-1.

changed. Exhibit 9, at 27-28. Judge Downing then amended Burton's judgment and sentence to reflect the correct offender scores. Exhibit 9, at 32; Exhibit 2. Judge Downing again sentenced Burton to a standard range sentence of 102 months for count II. Exhibit 2. Judge Downing adjusted the sentences on counts I and IV to reflect the corrected standard ranges on those counts, but Burton's total sentence remained at 102 months because the sentences were concurrent. Exhibit 2.

Burton appealed to the Washington Court of Appeals. Exhibit 26, Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 38810-0-I; Exhibit 27, Reply Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 38810-0-I. Burton also filed a personal restraint petition challenging the amended sentence. Exhibit 28, Personal Restraint Petition, *In re Burton,* Court of Appeals Cause No. 39120-8-I; Exhibit 29, Petitioner's Reply Brief, *In re Burton,* Court of Appeals Cause No. 39120-8-I. The court consolidated the petition with the direct appeal under cause number 38810-0-I. Exhibit 30, Order of Consolidation, *State v. Burton,* Court of Appeals Cause No. 38810-0-I (consolidated with cause number 39120-8-I). The court affirmed the judgment and sentence and denied the personal restraint petition. Exhibit 5.

Burton then sought discretionary review by the Washington Supreme Court, raising the following issues:

> 1. At resentencing, the State violated the terms of the plea agreement when the prosecutor:
>
> (a) Recommended a sentence of 102 months rather than the agreed-upon 90 months;

(b) Worked out a proposed order with Burton's prior attorney for a 102-month sentence, thus violating the 90-month promise in the plea agreement; and

(c) Made no recommendation at resentencing at all until asked to do so by Burton, and then equivocated on the promised recommendation.

2. The trial court erred in denying Burton's motion to withdraw his guilty pleas under these circumstances.

3. The Court of Appeals erred in finding:

(a) That "Burton's arguments might be more persuasive if the prosecutor's remarks had occurred during the original sentencing hearing."

(b) "[T]he [resentencing] hearing was not a substantive sentencing hearing at which the State was obligated to present a formal recommendation in accordance with the plea agreement."

(c) That when a prosecutor, as in this case, fails to adhere to the terms of a plea agreement, it is not a "manifest injustice" that would allow a defendant the right to withdraw his plea.

(d) That the deputy prosecutor's 102-month sentence recommendation did not constitute a breach of the State's obligation under the terms of the plea agreement.

Exhibit 31, Petition for Review, *State v. Burton,* Supreme Court Cause No. 65736-0, at 1-2.

The Supreme Court denied review on December 3, 1997. Exhibit 32, Order, *State v. Burton,* Supreme Court Cause No. 65736-0; *State v. Burton,* 133 Wn.2d 1027, 950 P.2d 475 (1997). The court of appeals issued its mandate on January 16, 1998. Exhibit 33, Mandate, *State v. Burton,* Court of Appeals Cause No. 38810-0-I.

2. Procedural History Related To King County Cause No. 93-1-06948-7 (Challenged Under Cause No. C98-1844L).

Burton appealed his 1994 convictions to the Washington Court of Appeals. Exhibit 34, Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 35747-6-I; Exhibit 35, Reply Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 35747-6-I; Exhibit 36, Pro Se Supplemental Brief, *State v. Burton,* Court of Appeals Cause No. 35747-6-I.[3] The court affirmed the convictions, but remanded for resentencing. Exhibit 6.

Burton sought discretionary review by the Washington Supreme Court. Exhibit 40, Petition for Review, *State v. Burton,* Supreme Court Cause No. 65706-8. Burton raised the following issues:

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[3] Burton also filed two personal restraint petitions which were later consolidated with Burton's direct appeal under cause number 35747-6-I. *See* Exhibit 37, Order of Consolidation, *In re Burton,* Court of Appeals Cause No. 38217-9-I; Exhibit 38, Order of Consolidation, *In re Burton,* Court of Appeals Cause No. 39119-4-I; Exhibit 39, Petitioner/Appellant's Reply Brief, *In re Burton,* Court of Appeals Cause No. 39119-4-I. The state court file received by Respondent do [sic] not contain a copy of the petitions, and Respondent is attempting to obtain a copy of the petitions.

1. Where a prosecutor violated an in limine ruling and injected highly prejudicial evidence that Burton was previously convicted of a crime involving another young male victim, did the resulting prejudice deny Burton a fair trial, particularly where Burton's prior conviction was void and reversed due to nearly identical unconstitutional prosecutorial misconduct by the same prosecutor?

2. Did the prosecutor's cross-examination of Burton by unproved innuendo constitute prejudicial misconduct which denied Burton a fair trial?

3. Where details from a hearsay statement to a medical technician are not necessary for treatment of diagnosis, does the statement fall outside the hearsay exception?

4. Where a state's witness's motive to fabricate arose before he wrote a letter, did the trial court err in admitting the letter as a prior consistent statement?

5. Did the trial court's exclusion of numerous defense exhibits, coupled with the court's refusal to authorize Burton to call a witness from Indiana to impeach the state's key witness's testimony, deny Burton his constitutional right to compulsory process and to present material evidence in his defense?

6. Did cumulative error deny Burton his right to a fair trial?

Exhibit 40, at 1-2.

Burton presented issues 1 and 6 as federal constitutional violations, but he presented issues 2, 3 and 4 as

mere errors of state law. Exhibit 40, at 11-20. Although he presented issue 5 to the Washington Supreme Court as a federal constitutional violation, Burton had presented the issue to the Washington Court of Appeals as a mere error of state law. *Compare* Exhibit 36, at 8-10, with Exhibit 40, at 18-19.

The Washington Supreme Court denied review on December 3, 1997. Exhibit 41, Order, *State v. Burton,* Supreme Court Cause No. 65706-8; *State v. Burton,* 133 Wn.2d 1025, 950 P.2d 475 (1997); Exhibit 42, Mandate, *State v. Burton,* Court of Appeals Cause No. 35747-6-I. The Supreme Court denied certiorari on April 20, 1998. *Burton v. Washington,* 118 S.Ct. 1533 (1998).

III. ISSUES

The petition filed under cause number C98-1844L raises the following grounds for relief:

1. Conviction obtained by plea of guilty which was unlawfully obtained when the state made a promise which it did not fulfill at re-sentencing.

2. Denial of effective assistance of counsel.

See Petition, Cause Number C98-1844L, at 5.

The petition filed under cause number C98-1846L raises the following grounds for relief:

> 1. Whether the error of using Mr. Burton's prior but reversed conviction for rape of a child in the third degree to corroborate witnesses testimony and to impeach Mr. Burton was harmless beyond a reasonable doubt?

2. Whether the trial court denied Mr. Burton his right to compel witnesses and present evidence in his defense by refusing to allow testimony of an Indiana prison official who could have testified that the State's primary jailhouse informant did not have access to Mr. Burton, and by refusing to allow Mr. Burton to admit letters and affidavits from the State's primary jailhouse informant which provided that his testimony and previous statements were coerced, bribed and perjurious?

3. Whether Mr. Burton was denied his right to confrontation by the State's attempt to impeach him with unproven innuendo?

4. Whether the multitude of trial errors cumulatively denied Mr. Burton of a fair trial?

See Petitioner's Memorandum, Cause No. C98-1846L, at 18.

IV. EXHAUSTION OF STATE REMEDIES

1. Claims Under Cause No. C98-1844L:

Burton properly exhausted claim 1. Burton failed to properly exhaust claim 2 because he never presented the claim to the Washington Supreme Court. Claim 2 is now procedurally barred.

2. Claims Under Cause No. C98-1846L:

Burton properly exhausted claim 1 and claim 4. Burton failed to present claim 3 to the Washington Supreme Court as a federal constitutional violation. Burton also raised claim 2 as a federal constitutional violation for the first and only time when seeking discretionary review. Burton failed to fairly present claim 2 to the state courts.

Claims 2 and 3 are now procedurally barred under Washington law.

V. EVIDENTIARY HEARING

Under the AEDPA, Burton is not entitled to an evidentiary hearing in a habeas corpus proceeding unless he shows:

> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. . . .

28 U.S.C. § 2254(e)(2).

Burton bears the burden of showing the necessity of a hearing. *Pulley v. Harris,* 692 F.2d 1189, 1197 (9th Cir. 1982), *rev'd on other grounds,* 465 U.S. 37 (1984). An evidentiary hearing is not required unless Burton "alleges *facts* which, if proved, would entitle him to relief." *Townsend v. Sain,* 372 U.S. 293, 312 (1963) (emphasis added). A hearing is not required if the claim presents a purely legal question, or if the claim may be resolved by reference to the state court record. *Campbell v. Wood,* 18 F.2d 662, 679 (9th Cir.) (*en banc*), *cert. denied,* 114 S. Ct. 2125 (1994). No

hearing is required where the state court has heard the factual dispute and entered findings of facts. *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992).

VI. STANDARD OF REVIEW

State court judgments carry a presumption of finality and legality. *McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994). Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991). The petitioner must prove his custody violates the Constitution, laws or treaties of the United States. *McKenzie*, 27 F.3d at 1418-19. If a petitioner establishes a constitutional trial error, the Court must determine if the error caused actual and substantial prejudice. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993). New rules of criminal procedure are not applicable to cases that became final before the new rule is announced unless the new rule: (1) decriminalizes certain conduct or prohibits the imposition of certain types of punishment for a class of defendants; or (2) constitutes a watershed rule of criminal procedure. *Teague v. Lane*, 489 U.S. 288, 310-12 (1989).

VII. ARGUMENT

A. CLAIM 2, UNDER CAUSE NO. C98-1844L, AND CLAIMS 2 AND 3, UNDER CAUSE NO. C98-1846L, ARE PROCEDURALLY BARRED UNDER AN INDEPENDENT AND ADEQUATE STATE LAW.

1. Burton Failed To Fairly Present The Claims To The Washington Supreme Court.

A state prisoner must exhaust state remedies with respect to each claim before petitioning for a writ of

habeas corpus in federal court. *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Claims for relief that have not been exhausted in state court are not cognizable in a federal habeas corpus petition. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 333 (1994).The exhaustion doctrine is based upon comity, not jurisdiction. *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

A claim must be "fully and fairly" presented to the state's highest court so as to give the state courts a fair opportunity to apply federal law to the facts. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270, 276-78 (1971). The petitioner must present the claims to the state's highest court, even where such review is discretionary. *Larche v. Simons*, 53 F.3d 1068, 1071-72 (9th Cir. 1995). A petitioner does not satisfy the exhaustion requirement merely by presenting his claims to the state court for the first and only time in a motion for discretionary review. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Ortberg v. Moody*, 961 F.2d 135, 138 (1992). "[W]here the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor,'" the claim has not been fairly presented to the state courts and therefore the claim is not exhausted. *Castille*, 489 U.S. at 351.

Petitioners must alert state courts "to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan v. Henry*, 115 S. Ct. 887, 888 (1995). A petitioner must expressly apprise the state courts that an alleged error is not only a violation of state law, but a violation of the Constitution. *Id.* "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted

regardless of its similarity to the issues raised in state court." *Johnson v. Zenon*, 88 F.3d 828, 830-31 (9th Cir. 1996).

A petitioner must "include reference to a specific federal constitutional guarantee. . . . " *Gray v. Netherland*, 116 S. Ct. 2074, 2081 (1996). Vague references to a broad constitutional principle do not satisfy the exhaustion requirement. *Id.* ("it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court."). Even where the petitioner argues an error deprived him of a "fair trial" or the "right to present a defense", unless the petitioner expressly states he is alleging a specific federal constitutional violation, the petitioner has not properly exhausted the claim. *Johnson*, 88 F.3d at 830-31.

The fact that a petitioner's state law claim was "essentially the same" as the claim subsequently asserted in federal court does not satisfy the exhaustion requirement. The Ninth Circuit held that *Duncan v. Henry* implicitly overruled the rule in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986). *Johnson*, 88 F.3d at 830 ("After *Duncan*, *Tamapua's* 'essentially the same' standard is no longer viable."). Citation to Washington case law, even if the case applied a standard similar to the federal standard, does not suffice to apprise the Washington courts of a federal claim.

It is the petitioner's burden to prove that a claim has been properly exhausted and is not procedurally barred. *Lambrix v. Singletary*, 117 S. Ct. 1517, 1523 (1997), *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Miranda v.*

Cooper, 967 F.2d 392, 398 (10th Cir.), *cert. denied*, 113 S. Ct. 347 (1992). Presentation of *some* constitutional claims in state court does not preserve in federal court all the petitioner's other claims. *Aldridge v. Dugger*, 925 F.2d 1320, 1326 (11th Cir. 1991); *Weeks v. Jones*, 26 F.3d 1030, 1044 (11th Cir. 1994).

Burton failed to present claim 2, cause number C98-1844L, to the Washington Supreme Court in any form. *See* Exhibit 31. Burton did present the factual basis of claim 3, cause number C98-1846L, to the Washington Supreme Court, but he did not specifically allege a federal constitutional violation. *See* Exhibit 40, at 13-18. Burton therefore failed to properly exhaust these two claims.

Burton presented claim 2, cause number C98-1846L, to the Washington Supreme Court as a federal constitutional violation. Exhibit 40, at 18-19. However, Burton presented the issue to the Washington Court of Appeals as a mere error of state law. Exhibit 36, at 8-10. Raising the claim as a federal issue for the first time on discretionary review did not properly exhaust the claim. *Castille*, 489 U.S. at 351.

2. Burton's Claims Are Procedurally Barred Under State Law.

If a petitioner fails to obey state procedural rules, the state court may decline review of a claim based on that procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). State procedural rules serve an important interest in finality of judgment, and significant harm may result if the federal courts fail to respect those rules. *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976). If the state court

clearly and expressly states that its judgment rests on a state procedural bar, the petitioner is barred from asserting the same claim in a federal habeas corpus proceeding. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Noltie v. Peterson*, 9 F.3d 802, 805 (9th Cir. 1993). The federal court must honor the state's procedural bar ruling even if the state court reaches the merits of the federal claim in an alternative holding. *Harris*, 489 U.S. at 264 n. 10; *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1447 n. 2 (9th Cir. 1989). A claim is also barred, despite the absence of a "plain statement", where the petitioner failed to exhaust state remedies and the state courts would now find the claim to be procedurally barred. *Noltie*, 9 F.3d at 805.

Burton is now barred from presenting his claims to the Washington Supreme Court. Under Washington law, a defendant may not file a collateral challenge to a judgment and sentence more than one year after the judgment becomes final. RCW 10.73.090. Burton's judgment on his 1992 convictions became final for the purposes of RCW 10.73.090 on January 16, 1998, when the Washington Court of Appeals issued its mandate. RCW 10.73.090(3)(b); Exhibit 33. Burton's judgment on his 1994 convictions became final when the United States Supreme Court denied the petition for writ of certiorari on April 20, 1998. RCW 10.73.090(3)(c); *Burton v. Washington*, 118 S.Ct. 1533 (1998). Because it is more than one year since the judgments became final, and the claims do not meet the exceptions in RCW 10.73.100, the claims are time barred.

Washington law also prohibits the filing of successive collateral challenges. RCW 10.73.140; RAP 16.4(d). A court must dismiss a personal restraint petition if the petitioner either raised the same claim in a prior petition, or the petitioner fails to show good cause for not having raised

the new claim in the earlier petition. Because Burton previously filed personal restraint petitions challenging his convictions, the Washington courts will dismiss any petition challenging the convictions without considering the merits of the claims.

Claim 2, under cause number C98-1844L, and claims 2 and 3, under cause number C98-1846L, are procedurally barred. Because Burton cannot show cause and prejudice, or a fundamental miscarriage of justice, the claims are not cognizable in federal court.

B. BURTON IS NOT ENTITLED TO RELIEF ON CLAIM 1, CAUSE NO. C98-1844L, AND CLAIMS 1 AND 4, CAUSE NO. C98-1846L, BECAUSE THE STATE COURT DECISIONS DENYING THE CLAIMS WERE NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) worked substantial changes to the law of habeas corpus. *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir., *cert. denied*, 117 S. Ct. 2497 (1997). The AEDPA applies because Burton filed his petition after April 24, 1996. *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). A petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d). State

court findings of fact are presumed correct unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The AEDPA eliminated the eight statutory exceptions found under former 28 U.S.C. § 2254(d).

The Court must respect the legal conclusions of the state courts unless the conclusions are contrary to or involve an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d). Although the terms "contrary to" and "unreasonable application" are not amenable to a rigid distinction and have overlapping meanings, "[t]he terms, read together, delineate the range of cases that warrant federal habeas relief." *Davis v. Kramer*, 167 F.3d 494, 500 (9th Cir. 1999). "[B]oth terms reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." *Id.*

"A state court decision may not be overturned on habeas review, for example, because of a conflict with Ninth Circuit-based law, but rather a writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." *Moore*, 108 F.3d at 264-65. Federal law is not clearly established "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301.

1. The Washington Courts Reasonably Determined The State Did Not Breach The Plea Agreement (Claim 1, C98-1844L).

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be

said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). A prosecutor's failure to comply with such a significant term of a plea agreement may, in some circumstances, render a plea involuntary. *Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *United States v. Read*, 778 F.2d 1437, 1440 (9th Cir. 1985). Although plea agreements are a matter of criminal jurisprudence, a plea bargain is contractual in nature and is measured by contract-law standards. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985); *United States v. De La Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993); *United States v. Myers*, 32 F.3d 411, 413 (9th Cir. 1994). Disputes over the terms of the agreement are determined by objective standards. *Read*, 778 F.3d at 1441.

In *United States v. Roberson*, 896 F.2d 388, 389 (9th Cir. 1990), the government agreed to recommend a sentence of five years imprisonment, with a consecutive five year suspended sentence and five years probation. *Id.* The government lived up to this agreement at entry of the plea and at sentencing. *Id.* at 392. Roberson later moved to correct his sentence under Rule 35(b), contending that factual inaccuracies existed in the pre-sentence investigation report. *Id.* at 389. At the Rule 35 hearing, the government attorney stated that "a sentence of ten years is not unreasonable." *Id* at 392. Roberson contended that the government breached the plea agreement. *Id.* Rejecting Roberson's claim, the Ninth Circuit held:

> We do not consider this statement to be a breach of the plea agreement. It was but one isolated comment in an extensive response to Roberson's contention that the sentence was illegal. In examining the argument as a whole we

> conclude that the government was merely defending the legality of the sentence. Perhaps it would have been preferable for government counsel to have described the sentence as "legal" instead of saying that it was "not unreasonable," but this one phrase did not vitiate the bargain. Fidelity to a plea bargain is measured by total conduct that manifests the spirit and intention of the parties; it is not measured by quibbling over an isolated fragment of the government's presentation. The government did not renege either at the time the plea was accepted or at sentencing. Under these circumstances we are persuaded that no breach of the plea agreement took place.

Roberson, 896 F.2d at 392.

In Burton's case, the prosecution complied with the terms of the plea agreement by recommending a 90 month sentence at the time of Burton's original sentencing in 1992. *See* Exhibits 8 and 9. The prosecution again recommended a 90 month sentence when Burton moved to amend his judgment and sentence in 1995. *See* Exhibit 23. At the subsequent hearing to amend the judgment and sentence, in response to Burton's question, the prosecutor did state that he would recommended 102 months. Exhibit 9, at 27. However, as in *Roberson*, this isolated comment did not constitute a breach.

The Washington Court of Appeals reasonably rejected Burton's claim, finding the prosecution did not violate the terms of the plea agreement:

> Due process requires the prosecutor to adhere to the terms of a plea agreement. *State v. Coppin*, 57 Wn. App. 866, 871, 791 P.2d 228, *review denied*, 115 Wn.2d 1011 (1990). A prosecutor breaches the plea agreement by recommending a

longer sentence or by otherwise failing to act as agreed. *In re James*, 96 Wn.2d 847, 640 P.2d 18 (1982). A defendant may be entitled to relief even if the breach was inadvertent. *State v. Collins*, 46 Wn. App. 636, 639, 731 P.2d 1157, *review denied*, 108 Wn.2d 1026 (1987); *Santobello v. United States*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) (new prosecutor inadvertently breached plea agreement by recommending longer sentence). When the prosecution has breached a plea agreement, the defendant is generally entitled to choose either specific enforcement or withdrawal of the guilty plea "unless there are compelling reasons not to allow that remedy." *State v. Miller*, 110 Wn.2d 528, 535, 756, 756 P.2d 122 P.2d 122 [sic] (1988).

Burton's arguments might be more persuasive if the prosecutor's remarks had occurred during the original sentencing hearing. As the prosecutor explained, however, he was presenting the court with an order that had been worked out with Burton's prior attorney and reflected the court's intention to impose the same sentence on count II. Moreover, although the hearing was held for the purpose of resentencing, the change in offender scores affected only counts I and IV; the standard range for count II remained the same. In the motion to amend the judgment and sentence, Burton's counsel had noted this fact and expressly asked the court to impose the same term that it had imposed originally (102 months). Indeed, Burton has never raised any argument identifying some basis for changing the sentence on count II.

In sum, as to count II, the hearing was not a substantive sentencing hearing at which the

> State was obligated to present a formal recommendation in accordance with the plea agreement. Viewed in context, the deputy prosecutor's "recommendation," which was solicited by Burton and not the trial court, constituted an acknowledgment of matters that had already been decided or that were not disputed and did not constitute a breach of the State's obligation under the terms of plea agreement. Accordingly, the trial court did not err in denying Burton's motion to withdraw his guilty plea. Moreover, even if the State's "recommendation" could be characterized as a technical breach of the plea agreement, it did not, under the circumstances, rise to the level of a "manifest injustice" that would require withdrawal under CrR 4.2(f).

Exhibit 5, at 5-7. This decision is not contrary to or an unreasonable application of clearly established federal law.

2. The State Courts Reasonably Found The Prior Conviction Evidence Did Not Prejudice Burton (Claim 1, C98-1846L).

"[A] federal habeas court may not prescribe evidentiary rules for the states." *Swan v. Peterson*, 6 F.3d 1373, 1382 (9th Cir. 1993). Alleged errors in the admission of the evidence are generally a matter of state law and are not cognizable in a federal habeas corpus proceeding. *Estelle v. McGuire*, 112 S. Ct. 475 (1991); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). Alleged errors are cognizable only when the evidence rendered the trial fundamentally unfair. *Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir. 1990).

The Supreme Court has clearly established that "the use of convictions constitutionally invalid under *Gideon v. Wainwright* to impeach a defendant's credibility deprives him of due process of law." *Loper v. Beto*, 405 U.S. 473, 483 (1972). This is because "the principle established in *Gideon* goes to 'the very integrity of the fact-finding process' in criminal trials, and that a conviction obtained after a trial in which the defendant was denied the assistance of a lawyer 'lacked reliability.'" *Loper*, 405 U.S. 483-84. However, the Supreme Court has not clearly established that due process prohibits impeachment with prior convictions which are invalid for reasons other than a *Gideon* violation. *See United States v. Garcia*, 771 F.2d 1369 (9th Cir. 1985) (admission of allegedly invalid state convictions as basis to revoke probation did not violate due process); *Smith v. Collins*, 964 F.2d 483, 486 (5th Cir. 1992) (reliance on *Loper* misplaced where prior convictions were invalidated because the indictments contained technical defects); *but see United States v. Fisher*, 106 F.3d 622, 629-30 (5th Cir. 1997) (rule applies to constitutional infirmities arising from lack of notice). Because the Supreme Court has not clearly established the rule asserted, Burton is not entitled to relief. Even if the rule applied, however, Burton is not entitled to relief unless the error caused actual and substantial prejudice. *Brecht*, 113 S. Ct. at 1722; *see also Tucker v. United States*, 431 F.2d 1292, 1293 (9th Cir. 1970), *aff'd*, 404 U.S. 443 (1972) (harmless error rule applied to *Burgett* errors); *Bates v. Nelson*, 485 F.2d 90 (9th Cir. 1974) (same).

The Washington Court of Appeals reasonably held that use of the impeachment evidence did not violate due process and did not prejudice Burton's defense:

At trial the court allowed the State to admit as an unnamed felony the Snohomish County conviction for rape of a child in the third degree, involving J.L.

Later, on April 24, 1995, this court reversed that conviction. *State v. Burton*, No. 31432-7-I (filed April 24, 1995). On remand, Burton pleaded guilty on October 6, 1995, to misdemeanor assault. He then moved the trial court for a new trial in the present matter. The trial court denied the motion without argument. Burton assigns error to this ruling. He contends the reversal of the Snohomish County conviction retroactively renders erroneous and incurably prejudicial the admission of that conviction to impeach his credibility in the trial of the M.C. matter, requiring reversal of his present conviction.

The pending appeal of a prior conviction does not render the prior conviction inadmissible at the time of trial. ER 609. The issue arises later, if and when the prior conviction is reversed. The question then becomes whether the constitutional error in the prior conviction rendered the fact-finding process in that prior case inherently unreliable. *See State v. Murray*, 86 Wn.2d 165, 167-68,.543 P.2d 332 (1975). A violation that goes to the "very integrity of the fact-finding process" requires reversal. *Murray*, 86 Wn.2d at 168, 543 P.2d 332.

The leading case defining the standard of review in such matters is *Loper v. Beto*, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972). In *Loper* the defendant was charged with statutory rape of an eight-year-old. The only two witnesses were the victim and the defendant. The defendant was impeached with four prior convictions, each of which had been obtained without the benefit of counsel as guaranteed by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792,

9 L. Ed. 2d 799 (1963). In *Loper*, "the issue of innocence or guilt . . . turned entirely on whether the jury would believe the testimony of an 8-year-old girl or that of Loper. And the sole purpose for which the prior convictions were permitted to be used was to destroy the credibility of Loper's testimony in the eyes of the jury." *Loper*, 405 U.S. at 482. Thus the Court answered affirmatively the question whether "the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?" *Loper*, 405 U.S. at 480.

This court followed *Loper* in a case where the defendant's theft conviction was based in part on impeachment evidence of a prior perjury conviction, and the prior perjury conviction was subsequently reversed for insufficient evidence, "a constitutional defect of the highest magnitude." *State v. White*, 31 Wn. App. 655, 666, 644 P.2d 693 (1982). In its harmless error analysis the *White* court said:

> A review of the record reveals sufficient evidence from which the jury could have inferred guilt without knowing of the tainted conviction. It is far from certain, however, that they would have so inferred. We cannot divine what weight the jury must have given to the perjury conviction in deciding whether to believe White's testimony, but we intuit that a conviction for perjury would have a great adverse effect.

White, 31 Wn. App. at 666, 644 P.2d 693. Accordingly, the *White* court reversed.

In contrast, our Supreme Court found *Loper* did not compel reversal in *State v. Murray* where the error in the prior conviction was a violation of the

exclusionary rule. The exclusionary rule is prophylactic; a violation of the exclusionary rule by the State does not impair the fact-finding process. Therefore, the use for impeachment of a conviction later reversed for a Fourth Amendment error does not violate the defendant's right to due process.

Unlike the situation in *Murray*, the constitutional error in Burton's Snohomish County conviction did go to the very integrity of the fact-finding process. The reversal was, as in *Loper*, due to a confrontation violation that denied Burton the right to a fair trial. Specifically, the prosecutor impeached Burton with statements he allegedly made, failed to prove them up, and used the unproved statements in closing argument.

But witness credibility was not central in Burton's trial in the M.C. matter as it was in *Loper*. The admission of the void conviction involving J.L. was merely cumulative of other impeaching evidence and, as discussed above, the Martin letter alone was overwhelming evidence of Burton's guilt.

The question is whether the conviction "might well have influenced the outcome of the case" such that it deprived Burton of due process. *Loper*, 405 U.S. at 480. Burton's conviction for the rape of J.L. came in as an unnamed felony and therefore could not have been as influential on the issue of Burton's veracity as was the admission of the named perjury conviction in *White*.

In summary, it is highly unlikely that the admission of the unconstitutionally obtained prior conviction influenced the outcome of the present case. We therefore hold that the trial court did not err in refusing to grant a new trial on this basis.

Exhibit 6, at 17-20.

Because this decision was not contrary to or an unreasonable application of clearly established federal law, Burton is not entitled to relief.

3. The Washington Courts Reasonably Determined That Burton Is Not Entitled To Relief Based Upon Cumulative Error (Claim 4, Cause No. C98-1846L).

The United States Supreme Court has never recognized cumulative error as a basis for federal habeas relief. *See Griffin v. Delo*, 33 F.3d 895, 903 (8th Cir. 1994). Although the Ninth Circuit has relied on cumulative error in certain limited circumstances, *see e.g., Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) and *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.), *cert. denied*, 113 S. Ct. 1363 (1992), when a petitioner fails to demonstrate prejudice arising from any single error, he is not entitled to relief under a cumulative error analysis. *Thompson v. Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996) ("Finding no prejudice from the errors considered separately, we also find no cumulative prejudice."). *Hunt v. Smith*, 856 F. Supp. 251, 258 (D. Md. 1994) ("The fact that many claims of . . . error are pressed does not alter fundamental math – a string of zeros still adds up to zero.").

Because the Supreme Court has not clearly established a rule of cumulative error, the state court decision denying this claim was reasonable:

> Burton claims that the errors in his case, if not prejudicial individually, are prejudicial cumulatively. He has not shown that any prejudice arising from each error had a cumulative effect, as in *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250

(1992), and *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Here, harmlessness is based on the decisive, untainted evidence of Martin's letter. The errors and irregularities do not undermine that evidence and therefore do not have a cumulative effect.

Exhibit 6, at 20-21.

Because the state court decision was not contrary to or an unreasonable application of clearly established federal law, Burton is not entitled to habeas corpus relief.

VIII. CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court deny Burton's consolidated petitions.

DATED this 3rd day of May, 1999.

Respectfully submitted,

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